Nos. 89-1433, 89-1434

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

United States of America, Appellant
v.
Shawn D. Eichman, et al., Appellees

On Appeal From The United States District Court
For The District of Columbia

United States of America, Appellant
v.
Mark John Haggerty, et al., Appellees

On Appeal From The United States District Court
For The Western District of Washington

BRIEF OF SOUTHEASTERN LEGAL FOUNDATION, INC. AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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INTEREST OF AMICUS

The Southeastern Legal Foundation, Inc. ("Southeastern") submits its brief *amicus curiae* in this case. The parties have consented to the filing of this brief and their consent letters have been filed with the Clerk of this Court.

Southeastern is a non-profit corporation organized in 1976 for the purpose of advancing public interest viewpoints in adversarial proceedings involving significant issues. Dedicated to economic and social progress through the equitable administration of law, Southeastern presents the views of its supporters who believe the rights of all persons should be properly protected and balanced in the courts. Toward that end, Southeastern has participated as *amicus curiae* in a number of cases before this Court, including *Common Cause v. Schmitt*, 455 U.S. 129 (1982); *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982); *South Florida Chapter of the AGC of America, Inc. v. Metropolitan Dade County, Florida*, 723 F.2d 846 (11th Cir. 1984), *cert. denied* 469 U.S. 871 (1984); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986); and *City of Richmond v. J.A. Croson Co.*, _____U.S._____, 109 S.Ct.706 (1989). Additionally, Southeastern has recently submitted its *amicus curiae* brief in *Astroline Communications Company Limited Partnership v. Shurberg Broadcasting of Hartford, Inc.*, Case No. 89-700, which is pending before the Court.

As proponents of the right to expression granted to all citizens by the Constitution, Southeastern recognizes that a tension exists between the First Amendment and any statutes restricting communicative activity. However, Southeastern and its supporters believe that the protection afforded our nation's flag by the Flag Protection Act of 1989, Pub. L. No. 101-131, Sections 1-3, 103 Stat. 777, is constitutional because it is content neutral.

Southeastern recognizes that only by ensuring that the freedoms cherished by all Americans are exercised in an orderly manner can we defend against abuses of these rights. In its brief, Southeastern argues that the Flag Protection Act of 1989 is constitutional and does not restrict Appellees' freedom of speech in any impermissible manner.

STATEMENT OF THE CASE

Southeastern adopts the statement of the case contained in the brief on behalf of Appellant United States of America.

SUMMARY OF ARGUMENT

The American flag is unique among all national symbols and must be protected. It is the single physical embodiment of our nation and its people which is universally recognized.

When both the House and Senate were considering legislation to protect the American flag from desecration they were very cognizant of this Court's recent decision in *Texas v. Johnson*. In order to guard against a successful constitutional challenge to the statute, Congress made the statute content - neutral. Violations of the Flag Protection Act of 1989 do not depend on the communicative impact of the conduct.

Freedom of expression has never been absolute under the Constitution. This Court has recognized many exceptions to absolute First

Amendment protection to various forms of expression. Burning the American flag falls within two recognized exceptions to First Amendment protection: obscenity and "fighting" words.

ARGUMENT

I.

THE AMERICAN FLAG IS A UNIQUE SYMBOL OF FREEDOM

Paradoxically, this Nation's banner, a unique and universally recognized symbol of freedom to people all over the world, may be desecrated by individuals who flaunt their hatred for our country and the freedoms we all cherish. Chief Justice Rehnquist, in his dissent in *Texas v. Johnson,* ____U.S._____, 109 S.Ct. 2533, 2552 (1989), recognized this uniqueness:

> The American flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another "idea" or "point of view" competing for recognition in a marketplace of ideas.

Our flag is the physical embodiment of our country and its people in all of our diversity. It

is a symbol of a people and a nation. It belongs to every citizen of this country, and each of us has a direct interest in preserving this symbol of freedom.

Henry Ward Beecher wrote, "[a] thoughtful mind, when it sees a nation's flag, sees not *the flag* only, but the nation itself; and whatever may be its symbols, its insignia, he reads chiefly in the flag the government, the principles, the truths, the history which *belongs to the nation* that sets it forth." (emphasis added.)

The American flag is a unique symbol of our nation. No other object or insignia so completely represents our country and its people. Because of the flag's singular status among all symbols of the United States it deserves to be treated with honor and respect. The Flag Protection Act of 1989 guarantees that the symbol of our nation is protected from vandalism and desecration.

II.

CONGRESS PASSED THE FLAG PROTECTION ACT OF 1989 TO PROTECT THE PHYSICAL INTEGRITY OF THE AMERICAN FLAG, AND NOT TO SUPPRESS FREE EXPRESSION

After this Court's decision in *Texas v. Johnson, supra*, Congress took specific and deliberative action to protect the integrity of the American flag. Several proposals were offered, and the Judiciary Committees of both the House

and Senate conducted extensive hearings with respect to the appropriate means of preserving a prohibition against flag burning. Both committees were consciously concerned about the statute's being consistent with the Court's holding in *Texas v. Johnson*. See, S. Rep. No. 152 at 10; and H.R. Rep. No. 231, at p. 2.

The Senate Committee's report addressed the potential problem of a conflict with *Texas v. Johnson*. In its report, the Committee recognized:

> [U]nlike the law struck down in *Texas v. Johnson* - which was content-based - S. 1338 is content neutral. Unlike the law struck down in *Texas v. Johnson*, whether one's treatment of the flag violates the amended Federal law would not depend on the likely communicative impact of the conduct. And unlike the law struck down in *Texas v. Johnson*, the amended Federal law is in fact "aimed at protecting the physical integrity of the flag in all circumstances."

S. Rep. No. 152, at 10.

The House Committee Report also was cognizant that its bill would face a constitutional challenge, and it was carefully considered and drafted in light of *Texas v. Johnson*. The House Report stated:

> The bill responds to [that] decision... by amending the current Federal flag statute to make it content neutral: that is, the amended statute focuses exclusively on the conduct of the actor, irrespective of any expressive message he or she might be intending to convey. The bill serves the national interest in protecting the physical integrity of all American flags in all circumstances. This interest is "unrelated to the suppression of free expression." *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968).

H.R. Rep. No. 231, at 2.

The careful attention given to the Flag Protection Act by both houses of Congress in order to avoid constitutional pitfalls is apparent. Throughout the entire deliberative and drafting process both the House and Senate Judiciary Committees realized their bills would face a constitutional challenge.

The majority opinion in *Texas v. Johnson* also clearly recognized--as do many prior decisions of this Court--that there is authority for governmental regulation of treatment of the United States Flag. Rejecting the argument that there was no such state interest, the Court pointed to Congress' enactment of "precatory regulations" for treatment of the flag and stated flatly that "we cast no doubt on the legitimacy of its interest in making such recommendations." 109 S. Ct. at 2547.

Although the challenged statute here goes beyond "precatory regulations," it is clearly an attempt by Congress to utilize its authority to the fullest extent possible to protect the American flag from unlawful abuse.

Moreover, it is clear from earlier decisions of this Court that until *Johnson*, there was an assumption that the government -- especially the Congress--could criminalize certain types of con-

duct aimed at the flag. *See Texas v. Johnson*, 109 S.Ct. 2533, 2554-55 (dissenting opinion of Justices Rehnquist, White and O'Connor.) As stated in a dissenting opinion by Justice Hugo Black, a keen student of the First Amendment, in *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354 (1969), "[i]t passes my belief that anything in the Federal Constitution bars the State from making the deliberate burning of the American Flag an offense." 89 S.Ct. at 1374. Similar views were expressed by Chief Justice Warren and Justice Fortas, in dissenting from the Court's decision in *Street*. *Id.* at 1367-77.

In view of these previously expressed views of members of the Court, it is not surprising that the reaction to this Court's decision in *Texas v. Johnson* was one of astonishment. Nor is it surprising that Congress, while considering the possibility and the necessity of a constitutional amendment, chose the less intrusive means available to it, enactment of a new statute, as a response to the Court's decision in *Texas v. Johnson*.

Congress has vast authority to enact criminal statutes for the protection of our national interest. For example, in the wake of violence directed at national officers, Congress enacted special legislation to protect the President and others in the order of succession, even though the prescribed conduct in question would also violate state law. 18 U.S.C.A. § 1751. Congressional authority to protect the flag and other national symbols has often been recognized by this Court. See e.g., *Smith v. Goguen*, 415 U.S. 566, 95 S. Ct. 1242, 1253 -1254 (1974) (con-

curring opinion by Justice White, stating Congress had power to "adopt and prescribe a national flag and to protect the integrity of that flag," along with its other powers.)

Sub judice this legislation is consistent with the longstanding view of Congress's authority to protect our institutions of government.

III.

THE CONDUCT PROHIBITED BY THIS STATUTE SHOULD BE HELD TO FALL WITHIN THE EXCEPTIONS TO COMPLETE FIRST AMENDMENT PROTECTION

Burning the American flag is a form of political obscenity. Put another way, in the words of Justice Rehnquist's dissenting opinion in *Texas v. Johnson*, flag burning is "the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others." 109 S.Ct. at 2553. As such, it falls into the category of unprotected classes of speech.

Freedom of expression is not, and never has been under our Constitution, absolute. Under the Constitution this Court has recognized many exceptions to absolute First Amendment protection to various forms of expression. In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942), a unanimous Court said:

"Allowing the broadest scope to the lan-

guage and purpose of the Fourteenth Amendment, it is well understood that *the right of free speech is not absolute at all times and under all circumstances.* There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the loud and obscene, the profane, the libelous, and the insulting or "fighting" words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.*, at 571-572, 62 S.Ct. at 769 (Footnotes omitted) (Emphasis added).

The burning of the American Flag falls under two of the recognized exceptions to complete First Amendment protection: obscenity and "fighting" words.

Burning our Nation's ensign is an obscenity to all citizens of this country. It is an act without any redeeming social value and it is an act which is designed and almost certain to incite violence.

The lower courts emphasized that the two flag burning incidents involved in the *Haggerty* and *Eichman* cases did not lead to any fighting or other public disturbance ending in destruction

or violence. Rather than concluding that flag burning does not lead to violence, as the two district courts have done, these two incidents should be seen as fortunate outcomes to very explosive situations. If the two flag burning incidents involved in this appeal had resulted in physical brawling between the flag desecrators and outraged citizens, would the lower court's holdings have been different? *Amicus* submits that the two lower court orders leave that possibility open.

CONCLUSION

Amicus respectfully requests that this Court reverse the judgments of the district courts, and uphold the constitutionality of the statute.

Respectfully submitted,

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